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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

74-520

ERNEST L. MONTANYE, former Superintendent of Attica Correctional Facility, et al.,

Petitioners,

against

RODNEY R. HAYMES,

Respondent.

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinions and Orders Below

The opinion of the Court of Appeals for the Second Circuit is reported at 505 F. 2d 977 and is reproduced in the appendix at 28a-39a. The opinion and order of the United States District Court for the Western District of New York is unreported and is reproduced in the appendix at 24a-27a.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on October 4, 1974. The petition for certiorari was filed on November 1, 1974. Certiorari was granted on June 30, 1975.

Statute

New York Correctional Law § 23(1) (McKinney's Supp. 1974):

> "The commissioner of correction shall have the power to transfer inmates from one correctional facility to another. Whenever the transfer of inmates from one correctional facility to another shall be ordered by the commissioner of correction, the superintendent of the facility from which the inmates are transferred shall take immediate steps to make the transfer. The transfer shall be in accordance with rules and regulations promulgated by the department for the safe delivery of such inmates to the designated facility."

Question Presented

Whether the Due Process Clause requires that an inmate who is transferred within a state from one maximum security prison to another, with no imposition of disciplinary penalties, be afforded notice of the reasons for the transfer and an opportunity to be heard?

Statement of the Case

Respondent Rodney R. Haymes was convicted of manslaughter in the first degree and confined at Attica Correctional Facility on August 10, 1971. On June 9, 1972 Haymes was transferred from Attica Correctional Facility to Clinton Correctional Facility. Attica and Clinton are maximum security prisons operated by the New York State Department of Correctional Services. 7 New York Code of Rules and Regulations [hereinafter N.Y.C.R.R.] §§ 100.5, 100.15.

In July, 1972 Haymes commenced a *pro se* action in the United States District Court for the Western District of

New York pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343, complaining that Attica prison officials had taken a document which he was circulating among the inmates in a recreation yard at Attica on the afternoon of June 7, 1972 (3a, 5a, 11a).* In his complaint, Haymes characterized the document as a "legal petition for the redress of grievances" (2a-6a) which he had prepared at the request of other inmates (19a).** Haymes further alleged that his removal from his position as a clerk in the Attica law library and his transfer to Clinton were reprisals for his rendering legal assistance to other inmates (5a-6a, 19a).

Haymes did not seek a transfer back to Attica nor any declaratory or injunctive relief. He requested $1,500 compensatory damages for the time he was deprived of the petition and $1,500 punitive damages for the alleged acts of reprisal. At some later date Haymes obtained counsel who submitted a memorandum of law to the District Court in November, 1972.

Haymes' *pro se* motion to add the correction officer in charge of the law library as a defendant (14a) was granted (25a). Haymes' principal claim against the officer was that he was depriving *other* inmates of access to the courts (16a-19a). This claim and certain others which appear in the *pro se* papers (to wit, that he was denied use of the law library for two hours on June 8, 1972 and that he was deprived of an alleged constitutional right to render, not receive, legal assistance) were not pursued in the District Court memorandum or on appeal.

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* All numbers followed by the letter "a" refer to the Appendix filed with this Court.

** The petition was addressed to Judge Curtin of the United States District Court for the Western District of New York and was signed by 82 inmates, not including Haymes. The petition complained that the removal of Haymes and another inmate from their positions as clerks in the Attica law library on the morning of June 7 deprived the signatories of legal assistance and access to the courts. It also complained of the allegedly obstructionist attitude of the correction officer in charge of the law library (13a).

The responses of the Attica correctional officials [hereinafter defendants] stated that Haymes had been relieved of his job assignment because of his continual disregard for the rules governing inmates and the use of the law library (10a). It was further averred that Haymes' circulation of the petition was a direct violation of the prison rule prohibiting the rendering of legal assistance without prior permission (11a); that neither Haymes nor any other inmates had requested that he be allowed to assist them with the petition (11a);* and that Haymes had been cautioned on several occasions about rendering legal assistance without approval (11a).

Although the prison authorities retained Haymes' petition, he was not disciplined at Attica in connection with the incident. Nor did he incur any disciplinary penalties, such as disciplinary confinement** or loss of good-time credits, when he was transferred to Clinton.

On June 4, 1973 the District Court issued an opinion and order dismissing the complaint (24a-27a). The Court held

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* Paragraph 21 of the Inmates Rule Book states:

> "21. Inmates are prohibited except upon approval of the Warden, to assist other inmates in the preparation of legal papers" (12a).

More liberal rules pertained to the rendering of legal assistance within the law library (12a).

** The special housing unit designated "segregation" (7 N.Y.C.R.R. § 300.2[c]) is ordinarily used for inmates specially confined after a disciplinary proceeding (N.Y.C.R.R. § 250 *et seq.*; § 304.1[d]) and those awaiting disciplinary hearings (7 N.Y.C.R.R. § 304.1[c]). Although there are certain minimal standards applicable to all special housing units (7 N.Y.C.R.R. §§ 300 *et seq.*), inmates in disciplinary confinement are not allowed to commingle, even with those on the same status. Those in other special housing units are permitted programs and privileges beyond the minimal standards (7 N.Y.C.R.R. § 302.3). An inmate placed in segregation after a disciplinary proceeding often loses other privileges as well. E.g. 7 N.Y.C.R.R. § 253.5.

that Haymes' transfer from one maximum security facility to another, even if motivated as punishment, did not violate his rights since there was no allegation that conditions at the receiving institution were harsher or substantially different from those at the transferring facility (26a). The Court stated that Haymes' transfer "was consistent with the discretion given to prison officials in exercising proper custody of inmates" (26a). The Court further found that the Attica legal assistance rule was reasonable as long as permission for inmates to assist one another was freely given. Since no permission had been sought in the instant situation, Haymes' rights had not been violated (26a).

On October 4, 1974 the Court of Appeals reversed the District Court, holding that Haymes' claims regarding his transfer stated a claim under 42 U.S.C. § 1983. The Court did not determine whether or not Haymes had a protected interest in his retention at Attica but stated that elementary fairness demanded that a transfer "intended as punishment" be preceded by notice of the reason for the transfer and an impartial hearing at which the facts underlying transfer would be ascertained and its effect on the inmate's future incarceration assessed (33a-34a).

Although referring to this Court's decision in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) the court below did not follow the *Wolff* analysis to ascertain if a transfer between two maximum security prisons was a penalty to which due process attached. It simply assumed that this was true. In doing so, the Court of Appeals ignored the fact that a New York inmate has no legitimate expectation that he will be placed or retained in a particular facility or that he will be transferred only in response to misconduct charged and proved.

While initially holding that a prisoner's allegation of punitive motivation for the transfer was sufficient to invoke due process (33a-34a), the Court went on to hold that an inmate could not obtain relief unless he could also prove

that the transfer "in fact had consequences sufficiently adverse to be properly characterized as punitive" (36a). The mere allegation by an inmate that his transfer was punitive was found sufficient to entitle him to a judicial hearing "to explain why the transfer was onerous to him" (38a, n. 7).

The court then listed hypothetical adverse consequences which might arise from the "mere fact of dislocation" (37a). These included distance from family and counsel, the need to adjust to a new environment, separation from former inmate friends, administrative segregation, loss of property, interruption of program, deprivation of medical and psychiatric treatment, and recording of the fact and perhaps the reason for the transfer in the inmate's parole board record (37a).

Haymes had not alleged any of these adverse consequences in the District Court. The Court of Appeals excused his failure on the grounds that a *pro se* complaint should be liberally construed, noting that Haymes was able to retain counsel only shortly before the District Court's decision (38a, n. 7). Actually, Haymes had counsel at least seven months prior to the District Court decision; his attorneys' memorandum of law was received by the District Court on November 6, 1972.

In light of its disposition on the transfer issue, the Court of Appeals did not reach Haymes' claim concerning the taking of his petition. In *dictum*, however, the Court did note that the petition was not automatically withdrawn from the category of legal assistance and thus freed of the prior approval requirement because it failed to demand relief or because it happened to be in the form of a letter to a public official (38a-39a).

ARGUMENT

An inmate transferred from one maximum security prison to another maximum security prison does not have a protected interest encompassed by the Fourteenth Amendment and is not entitled to notice of the reasons for the transfer and an opportunity to be heard.

The procedural protection of the Due Process Clause extends only to those interests encompassed within the Fourteenth Amendment's protection of liberty or property. *Board of Regents* v. *Roth*, 408 U.S. 564, 570 (1972). *Accord, Arnett* v. *Kennedy*, 416 U.S. 134, 164-165 (1974) (POWELL, J., concurring); *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). The initial inquiry is not into the "weight" but the "nature" of the interest. *Goss* v. *Lopez*, —— U.S. ——, 42 L.Ed. 2d 725, 735 (1975); *Roth*, 408 U.S. at 570-571; *Morrissey* v. *Brewer*, 408 U.S. at 481. The transfer of an inmate from one maximum security prison to another, without the imposition of disciplinary confinement or the loss of good-time credits, does not affect any Fourteenth Amendment interest in liberty or property possessed by the inmate.*

Property interests are not created by the Constitution but are legitimate claims of entitlement secured and defined by existing rules or understandings which stem from an independent source. *Roth*, 408 U.S. at 577. E.g. *Perry* v. *Sinderman*, 408 U.S. 593 (1972) (*de facto* tenure program

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* *Newkirk* v. *Butler*, 490 F. 2d 1214 (2d Cir. 1974), *vacated as moot, sub nom. Preiser* v. *Newkirk*, —— U.S. ——, 45 L.Ed. 2d 272 (1975), presented the question of whether an inmate transferred to a stricter security prison had a liberty or property interest protected by the Fourteenth Amendment. Defendants maintain that no prisoner has a protected interest in cases of intrastate transfers, regardless of the security classifications of the prisons. The case at bar is confined to a transfer between two institutions within the same classification level.

at a state college); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (welfare benefits under a statutory scheme). See generally *Geneva Towers Tenants Org.* v. *Federated Mortgage Inc.*, 504 F. 2d 483, 493-496 (9th Cir. 1974) (HUFSTEDLER, J., dissenting); Comment, Entitlement, Enjoyment, and Due Process of Law, 1974 Duke L.J. 89.

There is no independent source for Haymes' expectation that he would remain at Attica Correctional Facility. In New York, a person convicted of a felony and sentenced to an indeterminate period of imprisonment* is committed to the custody of the New York State Department of Correctional Services. N.Y. Crim. Proc. Law § 430.20; N.Y. Penal Law § 70.30(1). The sentencing court cannot commit the person to a specific institution. See N.Y. Corr. Law § 71(6) (McKinney's Sup. 1974).** The Commissioner of the Department is directed to designate and classify facilities according to age, sex, security level, and function, N.Y. Corr. Law §§ 70(5), (6) and has done so. 7 N.Y.C.R.R. §§ 100 *et seq.* Adult, male felons are initially delivered to a reception center at a maximum security prison (N.Y. Corr. Law § 71[1]; 7 N.Y.C.R.R. § 103.10) where they are evaluated for initial transfer into one of the Department's institutions.

Once inmates are placed within the Department's custody, the Commissioner is specifically empowered by statute to "transfer inmates from one correctional facility to another". N.Y. Corr. Law § 23. See *People ex rel. Sacconanno* v. *Shaw*, 4 A.D. 2d 817, 164 N.Y.S. 2d 750 (3rd Dept. 1957); *People* v. *Collins*, 200 N.Y.S. 2d 919 (Co. Ct.

* See N.Y. Penal Law §§ 70.00, 70.00(4) (McKinney's Supp. 1974). Haymes was convicted of a class B felony and sentenced to an indeterminate sentence of up to eighteen years imprisonment.

** New York's current Correction Law appears in the 1974 supplement to volume 10B of McKinney's Consolidated Laws of New York, and all Correction Law references herein are to that supplement.

Schenectady Co. 1960); *People ex rel. Stephani* v. *North*, 19 Misc. 616, 155 N.Y.S. 595 (Sup. Ct. Clinton Spec. Term 1915). The Commissioner has delegated the power to transfer to the Division of Inmate Classification, established pursuant to N.Y. Corr. Law § 7, which must approve all transfers. No regulations have been promulgated in connection with the Commissioner's discretionary power to transfer. Transfers are not among the penalties which can be imposed after prison disciplinary hearings. See 7 N.Y.C.R.R. § 253.5.*

The New York statutory scheme refutes any claim of entitlement by an inmate to be placed or retained at any particular facility. No contrary practices or policies were suggested by Haymes or by the court below. Haymes could have no more than a "unilateral expectation" with respect to his place of confinement, and such expectations have been held by this Court to be insufficient to support a property interest encompassed by the Fourteenth Amendment. *Roth*, 408 U.S. at 577.

In contrast to the case at bar, the convicted parties asserting due process rights in *Morrissey* v. *Brewer*, 408 U.S. 471 and *Wolff* v. *McDonnell*, 418 U.S. 537 (1974), relied on state schemes which secured their claims of entitlement to a particular status. In *Morrissey*, parolees who faced the possibility of a significant loss of freedom if they were reincarcerated after revocation of their conditional liberty "relied on at least an implicit promise that parole will be revoked only if [they failed] to live up to the parole conditions." 408 U.S. at 482. See also *Gagnon* v. *Scarpelli*, 411 U.S. 656 (1973) (probation revocation). In *Wolff*, inmates subject to loss of good-time credits or disciplinary confinement, could expect, because of state statute and regulation, that such penalties would normally be imposed only after "flagrant or serious misconduct" which had to

* Compare United States Bureau of Prison Policy Statement No. 7400.5D, "Inmate Discipline", §§ 9(b), 9(d)(6) (July 7, 1975); California Department of Corrections Manual, Ch. VI, "General Transfer Procedures," § CL-VI-16 (included in the appendices of *amici*).

be reported to and evaluated by a disciplinary panel. 418 U.S. at 545 n. 5, 548-552 n. 8, 571-572 n. 19.

A Fourteenth Amendment interest in liberty does not extend to an inmate's desire to be placed or retained at a particular prison. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston,* 334 U.S. 226, 285 (1948). See also *Wolff,* 418 U.S. at 555-556; *Jackson* v. *Goodwin,* 400 F. 2d 529, 532 (5th Cir. 1968). One right necessarily withdrawn is the freedom to choose one's place of residence.

An inmate has no protected interest with respect to his initial placement, e.g. *Palmigiano* v. *Mullen,* 491 F. 2d 978, 980 (1st Cir. 1974); *Van Sirrs* v. *Ciccone,* 437 F. 2d 884 (8th Cir. 1971); *Duval* v. *Willingham,* 390 F. 2d 203 (10th Cir.), *cert. den.* 393 U.S. 877 (1968); *Lawrence* v. *Willingham,* 373 F. 2d 731 (10th Cir. 1967); *Rayborn* v. *Swope,* 215 F. 2d 604 (9th Cir. 1954); *Muniz* v. *United States,* 280 F. Supp. 542, 547 (S.D.N.Y. 1968), and he acquires no greater rights merely because he has served part of his sentence at a particular prison. See *United States* v. *Tierce,* 455 F. 2d 511 (9th Cir. 1972); *Fowles* v. *Anderson,* 386 F. Supp. 307, 309 (E.D. Okla. 1974); *Slotkin* v. *Brookdale Hospital Center,* 357 F. Supp. 701, 705 (D. Md. 1973); *King* v. *Norton,* 336 F. Supp. 255 (D. Conn. 1972); *Genovese* v. *Ciccone,* 331 F. Supp. 1117 (W.D. Mo. 1971).*

* Indeed if such a right accrued and a notice and hearing were required, the New York State Department of Correctional Services would have had to conduct 18,641 hearings in 1974, since 18,641 inmates were transferred among its institutions (see *post* at 16).

The suggestion by the court below that only those transfers "intended as punishment" invoke due process is of little assistance to the Department in determining when a hearing should be held. See, e.g., *Fano* v. *Meachum,* —— F. 2d —— (1st Cir. June 27, 1975) (CAMPBELL, J., dissenting), petition for certiorari filed, August 16, 1975; *Jones* v. *Manson,* 393 F. Supp. 1016, 1024 (D. Conn. 1975) (Commissioner of Correction would not be held liable

(footnote continued on following page)

A prisoner may not compel his transfer to a particular prison. E.g. *Moore* v. *United States Attorney General,* 473 F. 2d 1375 (5th Cir. 1973) (seeking a transfer to a prison closer to the inmate's wife and children); *Blassingame* v. *United States Attorney General,* 387 F. Supp. 418, 420, (S.D.N.Y. 1975) (seeking a transfer to the district where the inmate's action was pending); *People* v. *Hoffner,* 191 Misc. 345, 76 N.Y.S. 2d 915 (Co. Ct. Queens Co. 1947) (seeking a transfer to home county to consult with counsel). See also *Hawthorne* v. *People,* 68 Misc. 2d 964, 328 N.Y.S. 2d 488 (Sup. Ct. Albany Co. 1971) (refusal to transfer an inmate to a prison closer to his family does not constitute cruel and unusual punishment). Perforce, he may not avoid transfer and compel his retention at the prison to which he was last assigned.

The error in the court below flows from its failure to analyze whether Haymes had any protected interest at all in connection with his transfer. Rather, the Court focused on the punitive motivation and character of the transfer and the potentially adverse consequences ("grievous loss") to the inmate. Neither line of reasoning comports with this Court's prior decisions.

Wolff v. *McDonnell, supra,* extended certain procedural protections to inmates facing disciplinary confinement or the loss of good-time credits. The inmates whose good-time credits might be forfeited had no pure liberty interest in early release from custody but rather a statutorily based expectation that such credits would not be reduced except if they were found guilty of serious misconduct. 418 U.S. at 556-558. Similarly, the inmates who

(footnote continued from preceding page)

in damages when he believed in good faith that the transfer was for security not disciplinary reasons). Under the prior reasoning of the Court in *Newkirk* v. *Butler,* 499 F. 2d at 1217, the reason or label of the transfer was discounted in determining if process was owed to a transferred inmate. See also, *Gomes* v. *Travisono,* 510 F.2d 537, 541 (1st Cir. 1974), *modifying* 490 F. 2d 1209 (1973); *Kessler* v. *Cupp,* 372 F. Supp. 76 (D. Ore. 1973).

could be placed in disciplinary confinement not only faced a major change in conditions of confinement* but also had the same statutorily based expectation that such confinement would be imposed only after a major act of misconduct was charged and proved. *Id.* at 571-572 n. 19.

The court below did not apply the *Wolff* analysis to Haymes' transfer but simply assumed that a transfer between two maximum security prisons was a disciplinary penalty to which *Wolff* applied.** Applying the two-pronged reasoning of *Wolff* to the instant situation, it is apparent that Haymes suffered no punishment which warranted the protections of procedural due process. First, Haymes had no legitimate expectation that he would be remain at Attica or be transferred only for misconduct (*ante* at 8-9). Second, he suffered no major change in the conditions of confinement by virtue of the transfer. In fact, he was in the same position after the transfer as before. Haymes was not subjected to disciplinary confinement or the forfeiture of good-time credits. See *Bundy* v. *Cannon*, 328 F.Supp. 165 (D.Md. 1971). Because Attica and Clinton are both maximum security prisons, he was no more restricted in his conditions of confinement at Clinton than at Attica. There was no "marked" or "drastic" change from his previous custodial status. See *Palmigiano* v. *Baxter*, 487 F. 2d at 1284; *United States ex rel. Miller* v. *Twomey*, 479 F. 2d at 717. Unlike the segregated inmate, Haymes was not removed from the ordinary milieu of general population to an area of restricted confinement which is designed as a disciplinary tool.

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* Other courts also required a "marked" or "sufficiently drastic" change in status before mandating due process for inmates. E.g. *Palimigiano* v. *Baxter*, 487 F. 2d 1280, 1284 (1st Cir. 1973), *vacated and remanded*, 418 U.S. 907 (1974), *on remand*, 510 F. 2d 534 (1974), *cert. granted*, —— U.S. ——, 43 U.S.L.W. 3641 (June 9, 1975); *United States ex rel. Miller* v. *Twomey*, 479 F. 2d 701, 717 (7th Cir. 1973), *cert. den. sub nom. Gutierrez* v. *Dept. of Public Safety*, 414 U.S. 1146 (1974).

** Not every response to misconduct entitles an inmate to procedural due process. See *Wolff*, 418 U.S. at 571-572 n. 19 ("We do not suggest, however [that the same procedures] would also be required for the imposition of lesser penalties such as loss of privileges"). This Court has granted certiorari to review a contrary decision. *Cluchette* v. *Procunier*, 510 F. 2d 613 (9th Cir. 1975), *cert. granted sub nom. Enomoto* v. *Cluchette*, —— U.S. ——, 43 U.S.L.W. 3641 (June 9, 1975).

Additionally, the Court of Appeals erred in holding that the inmate was entitled to relief if he proved that his transfer was intended as punishment and that it had "consequences sufficiently adverse to be properly characterized as punitive" (36a). This focus on grievous loss, which goes to the weight and not the nature of the inmate's interest, ignores the dictates of this Court, e.g. *Goss* v. *Lopez*, 42 L.Ed. 2d at 735; *Roth*, 408 U.S. at 570-571; *Morrissey* v. *Brewer*, 408 U.S. at 481; *Fuentes* v. *Shevin*, 407 U.S. 67, 90 n. 21 (1972), and is characteristic of the lower court decisions in the prison transfer area.*

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* Prior to the decision at bar, no court had ruled that procedural due process was owed to an inmate transferred within a state between two prisons of the same security classification. Those cases mandating due process procedures have concerned transfers to stricter security prisons and transfers of an interstate nature. In each area the courts have focused on the loss suffered by the inmate, with no analysis of liberty or property interest. E.g. *Gomes* v. *Travisono*, 490 F. 2d 1209 (1st Cir.) *vacated and remanded*, 418 U.S. 909, *on remand* 510 F. 2d 537 (1974); *Kessler* v. *Cupp*, 372 F. Supp. 76 (D. Ore. 1973); *Ault* v. *Holmes*, 369 F. Supp. 288 (W.D. Ky. 1973), *aff'd. in relevant part*, 506 F. 2d 288 (6th Cir. 1974) [interstate transfers]; *Newkirk* v. *Butler*, 490 F. 2d 1214 (2d Cir. 1974), *vacated as moot*, —— U.S. ——, 45 L.Ed. 2d 272 (1975); *Walker* v. *Hughes*, 386 F. Supp. 32 (E.D. Mich. 1974); *Stone* v. *Egeler*, 377 F. Supp. 115 (W.D. Mich. 1973), *aff'd. in relevant part*, 506 F. 2d 287 (6th Cir. 1974); *White* v. *Gilman*, 360 F. Supp. 64 (S.D. Iowa 1973) [transfers to stricter security prisons]. See also *Carroll* v. *Sielaff*, 514 F. 2d 415 (7th Cir. 1975); *Jones* v. *Manson*, 393 F. Supp. 1016 (D. Conn. 1975); Millemann & Millemann, The Prisoner's Right to Stay Where He Is, 3 Capital Univ. 223 (1974).

The same emphasis on grievous loss characterized those decisions professing to analyze for a property or liberty interest. E.g. *Fano*

(footnote continued on following page)

Moreover, the possible adverse consequences posited by the court below do not constitute a grievous loss which would invoke due process. Almost any change in the status of a prisoner may be perceived by him as a grievous loss. However, loss which is subjectively perceived as grievous, such as the possibility that discharge from employment may make one less attractive to some other employers, does not in itself invoke the right to notice and a hearing. *Roth*, 408 U.S. at 574 n. 13; *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896-898 (1961). The hypothetical consequences enumerated by the Court of Ap-

(footnote continued from preceding page)

v. *Meachum*, —— F. 2d —— (1st Cir. June 27, 1975), petition for certiorari filed, August 16, 1975; *Robbins* v. *Kleindienst*, 383 F. Supp. 239 (D.C.D.C. 1974); *Croom* v. *Manson*, 367 F. Supp. 586 (D. Conn. 1973); *Hoitt* v. *Vitek*, 361 F. Supp. 1238 (D. N.H. 1973). See *Gomes* v. *Travisono*, 510 F. 2d at 539. See also Note, Procedural Due Process in the Involuntary Transfer of Prisoners, 60 Va. L. Rev. 333 (1974); Note, Prison Discipline, 8 Ga. L. Rev. 919, 934-939 (1974).

Prior to the instant decision, two District Courts in the Second circuit had ruled that no claim cognizable under 42 U.S.C. § 1983 was stated by an inmate complaining of a transfer between two maximum security prisons within a state. *Schumate* v. *People of the State of New York*, 373 F. Supp. 1166 (S.D.N.Y. 1974); *Wells* v. *McGinnis*, 344 F. Supp. 594 (S.D.N.Y. 1972). See also *Beatham* v. *Manson*, 369 F. Supp. 783 (D. Conn. 1973) (transfer to less secure prison). Other courts considering the claims by transferred inmates found no constitutional interest implicated, regardless of the security classification of the two prisons or the interstate nature of the transfer. E.g. *Fajeriak* v. *McGinnis*, 493 F. 2d 468 (9th Cir. 1974); *Gray* v. *Creamer*, 465 F. 2d 179 (3rd Cir. 1972); *Hillen* v. *Director*, 455 F. 2d 516 (9th Cir. 1972), *cert. den.* 409 U.S. 989 (1972); *Benfield* v. *Bounds*, 363 F. Supp. 160 (E.D.N.C. 1973); *Urbano* v. *McCorckle*, 334 F. Supp. 161 (D. N.J. 1971), *aff'd.* 481 F. 2d 1400 (3rd Cir. 1973); *Bundy* v. *Cannon*, 328 F. Supp. 165 (D. Md. 1971).

Given that no state of the law in 1972 required due process before transferring an inmate between two maximum security prisons, defendants have unassailable defenses of good faith and official immunity to Haymes' demand for damages with regard to his transfer. See *Wood* v. *Strickland*, —— U.S. ——, 43 L. Ed. 2d 214 (1975). *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Fitler* v. *Rundle*, 497 F. 2d 794 (3rd Cir. 1974).

peals (37a) do not inflict a grievous loss on a prison inmate.•

An inmate does not suffer a constitutionally significant loss because he is geographically distant from his family or counsel, whether because of his initial placement or a transfer. That Haymes happened to be closer to home while at Attica Correctional Facility was solely incidental to his initial placement there. Nor does an inmate acquire a right to particular friends or a particular environment after his initial transfer into a prison. These aspects of prison life are not guaranteed by the Constitution or statute to a convicted person. To the contrary, the freedom to control these aspects of life is precisely what is stripped from an inmate by virtue of his conviction and incarceration. See, e.g., *Wolff*, 418 U.S. at 555-556; *Price* v. *Johnston*, 334 U.S. at 285.

The interruption of a particular educational or rehabilitative program does not impose a grievous loss on an inmate. An inmate has no right to any particular program (*Diehl* v. *Wainwright*, 419 F.2d 1309 [5th Cir. 1970], *Smith* v. *Schneckloth*, 414 F.2d 680, 682 [9th Cir. 1969]; *Russell* v. *Oliver*, 392 F. Supp. 470, 474 [W.D. Va. 1975]; *Thogmartin* v. *Moseley*, 313 F. Supp. 158, 160 [D. Kan. 1969], *aff'd.* 430 F.2d 910 [10th Cir.], *cert. den.* 400 U.S. 910 [1970]), let alone to an uninterrupted program. An interruption of an inmate's program can occur for myriad reasons, some related, some unrelated to his behavior. Haymes made no claim regarding an interruption of his program by virtue of his transfer, nor could he, since the

• Defendants emphasize that Haymes, who did not seek a transfer back to Attica, never alleged any of these consequences in the District Court (2a-6a, 14a-21a). It was not until his Court of Appeals brief that Haymes revealed that he suffered because of the geographic distance of Clinton from his home and family in Buffalo (Brief at 3, 11). Even while suggesting other possible results of a transfer, Haymes still did not claim that any were applicable to him personally (Brief at 11).

record establishes that he was removed from his program assignment as law clerk before the transfer occurred. Nor is grievous loss incurred because a transferred inmate may spend time apart from general population while he is being received at a new institution.* This separation is distinct from disciplinary confinement and is an ordinary incident of reception for any transferred inmate, irrespective of the reason for the transfer.**

Finally, the court below suggested that the fact of the transfer and perhaps the reason therefor, may become part of the record reviewed by the parole board and that an inmate may have difficulty rebutting the alleged adverse inference to be drawn. It is speculative in the extreme to imagine that the mere notation that an inmate has been transferred carries a negative inference. Transfers are so routine and frequent that no inference is drawn at all. In 1974 18,641 inmates were transferred among New York State facilities; in 1973 approximately 14,000 transfers were made. In the first seven months of this year over 12,100 transfers have already been made. The increase each year is due to the expanded number of correctional institutions and programs as well as an increase in the number of inmates.

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* Inmates transferred to a new institution may be placed in reception housing for a physical examination, an interview with the program committee, and orientation.

** Two other hypotheticals posited by the court below, the possibility of losing property and the deprivation of facilitites and medications for psychiatric and medical treatment, are totally unsupported by the record in this case. The Department of Correctional Services has advised the Attorney General that medical and psychiatric facilities and treatment do not vary among its maximum security prisons.

An inmate who loses property during a move, or at any other time, may pursue his claim administratively or pursuant to N.Y. State Finance Law § 8(12). It is a required procedure that transferring inmates be present at the packing and unpacking of their property, at which times they sign a standard inventory form used by all of the prisons.

It is likewise speculative to assume that a notation of reasons for the transfer will have an adverse effect on the inmate.* By law and regulation discretionary release on parole "shall not be granted merely as a reward for good conduct or efficient performances of duties assigned in prison." N.Y. Corr. Law § 213. The Board of Parole is directed to consider diverse factors such as the inmate's prior record, the nature of the crime, his attitude toward the crime and the victim, his response to efforts to improve his mental and moral condition, his institutional conduct, and the environment to which he plans to return. N.Y. Corr. Law § 214(4); 7 N.Y.C.R.R. § 1910.15. Parole release will be granted only if there is a reasonable probability that "if such prisoner is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society." N.Y. Corr. Law § 213. The inmate appears before the Board for a personal interview. N.Y. Corr. Law § 214(4), (5). Haymes did not suggest that the reason for his transfer was before the Board of Parole or that it affected his chance for parole release.

One of the most important instruments of penal management is the power to decide in which prison an inmate should be incarcerated. The range of reasons for transferring an inmate is quite broad. They include the initial classification decision to transfer an inmate from a reception center to a correctional facility; placement because of the opening or closing of a particular education or vocational program or an inmate's adjustment to a program; placement because of staff reductions or overcrowding; placement to separate those who present a danger to other inmates or a threat to institutional security; placement to protect an inmate from assaults or enemies; placement

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* In *Newkirk* v. *Butler*, 499 F. 2d at 1217, the same court stated that the absence of adverse parole consequences was not controlling.

closer to the inmate's release point. Added to the complexity of reasons for transfers is their sheer volume—the New York State Department of Correctional Services anticipates over 21,000 transfers among its twenty-seven correctional facilities in 1975.

This Court has recognized that the management of New York's prisons is of acute interest to the State and is intricately bound to its laws, regulations, and procedures. *Preiser* v. *Rodriguez*, 411 U.S. 475, 491-492 (1973). Federal courts "do not sit to supervise prisons" and the latitude must be accorded to prison officials in the administration of prison affairs. *Cruz* v. *Beto*, 405 U.S. 319, 321 (1972).

> "There is no doubt that discipline and administration of State detention facilities are State functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene." *Johnson* v. *Avery*, 393 U.S. 483, 486 (1969).

Transfers between two prisons of the same security classification, unaccompanied by disciplinary confinement or the loss of good-time credits, affect no protected interest possessed by inmates and present no constitutional issue to this Court.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Dated: New York, New York, September 3, 1975.

Respectfully submitted,

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